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**Lisa C. McKinney**

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September 18, 1996

**VIA FACSIMILE AND  
UPS NEXT DAY AIR**

Ms. Erica Stubbs  
Clerk  
Environmental Appeals Board  
607 Fourteenth Street, N.W., Suite 500  
Washington, D.C. 20005

**RECEIVED**

**SEP 19 1996**

**REGIONAL HEARING  
CLERK**

Re: In re: Gary Development Company, Inc.  
Environmental Appeals Board  
RCRA (3008) Appeal No. 96-2  
Docket No. RCRA-V-W-86-R-45  
Our File No.: 9225-1

Dear Ms. Stubbs:

Enclosed for filing with the Environmental Appeals Board are the original and five copies of the Respondent's "Second Amendment to Verified Motion to Reconsider Final Order," which we ask that you file with the Board, returning file-marked copies to our office in the enclosed self-addressed, stamped envelope.

Thank you for your assistance in this matter.

Sincerely,

**BOSE MCKINNEY & EVANS**

*Lisa C. McKinney*  
Lisa C. McKinney

LCM:ln

Enclosures

cc: Warren Krebs

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2700 First Indiana Plaza  
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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

In re:	)	
	)	
Gary Development Company,	)	RCRA (3008) APPEAL No. 96-2
	)	Docket No. RCRA-V-W-86-R-45
Respondent.	)	

**SECOND AMENDMENT TO VERIFIED  
MOTION TO RECONSIDER FINAL ORDER**

Respondent, Gary Development Company, Inc., ("GDC"), by counsel, pursuant to 40 C.F.R. § 22.32, respectfully submits this Second Amendment to Verified Motion to Reconsider Final Order of the Environmental Appeals Board ("EAB"), and states as follows:

1. On or about August 16, 1996, the EAB issued an Order Dismissing Appeal (the "August 16 Order"), under the terms of which the EAB dismissed GDC's Notice of Appeal Objection to the Decision and Order dated April 8, 1996, asserting that it had been filed in an untimely manner.

2. On or about August 30, 1996, GDC moved the EAB to reconsider its August 16, 1996 decision, wherein the EAB dismissed GDC's appeal of the Presiding Officer's Decision and Order ("Initial Decision") dated April 8, 1996.

3. On or about September 3, 1996, GDC submitted to the EAB an Amendment to Verified Motion to Reconsider Final Order. GDC herein submits to the EAB this Second Amendment to Verified Motion to Reconsider Final Order.

4. The requirements for service of all rulings, orders, and decisions in proceedings covered by EPA's Consolidated Rules of Practice Governing the

Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Consolidated Rules") are set forth in 40 C.F.R. § 22.06.

5. The requirements for the filing of an Initial Decision of an EPA Presiding Officer are set forth in § 22.27 of the Consolidated Rules. 40 C.F.R. § 22.27.

6. Section 22.06 states as follows:

All rulings, orders, *decisions*, and other documents issued by the Regional Administrator, Regional Judicial Officer, or Presiding Officer, as appropriate, shall be filed with the Regional Hearing Clerk. . . . Copies of such rulings, orders, *decisions*, or other documents shall be *served* personally, or by certified mail, return receipt requested, upon all *parties* by the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer, as appropriate. (Emphasis added.)

7. Section 22.27 states, in pertinent part, as follows:

(a) Filing and contents. The Presiding Officer shall issue and file with the Regional Hearing Clerk his Initial Decision *as soon as practicable* after the period for filing reply briefs under Section 22.26 has expired. . . . Upon receipt of an Initial Decision, the Regional Hearing Clerk shall forward a copy to all *parties*. (Emphasis added.)

8. "Party" is defined in § 22.03(a) as "any person that participates in a hearing as complainant, respondent, or intervenor." 40 C.F.R. § 22.03(a).

9. Service of pleadings and documents upon a domestic corporation must be by personal service or certified mail "directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by federal or state law to receive service of process." 40 C.F.R. § 22.05(b)(11).

10. Consistent with the requirements of 40 C.F.R. § 22.27, the Initial Decision in this matter was filed with the Regional Hearing Clerk on April 10, 1996. However, contrary to the requirements of § 22.05, 22.06 and 22.27 of the Consolidated Rules, the Initial Decision was not served upon GDC, the *party* in this matter, nor upon its appointed and known registered agent, C T Corporation System, upon whom EAB served the Complaint in May 1986. Furthermore, the Initial Decision was not issued *as soon as practical* after the filing of reply briefs as is contemplated for accurate service under 40 C.F.R. § 22.27.

11. Both prior to and subsequent to the issuance of the Initial Decision in this matter, all non-procedural documents and orders issued by EPA, the Presiding Officer, or the EAB, which were directed to GDC were sent to, or served upon, GDC directly. Such documents include the Complaint and Compliance Order dated May 30, 1986, the June 21, 1996 Notice of Appeal of Gary Development Company, Inc. Objecting to Decision and Order Dated April 8, 1996, the July 17, 1996 Order, and the EAB's August 16 Order.

12. The Consolidated Rules draw a sharp distinction between *party* and *counsel*. 40 C.F.R. § 22.05(c)(3) states, in pertinent part, as follows:

[T]he original of any pleading, letter or other document (other than exhibits) shall be signed by the *party* filing or by *his counsel* or other representative. . . .

Moreover, 40 C.F.R. § 22.10 states that "any party may appear in person or by counsel or other representative." Thus, the Consolidated Rules require service of the Initial Decision upon GDC.

13. Because GDC was not served with the Initial Decision, the time for responding or appealing those decisions has not lapsed.

14. The initial document filed by GDC was its Request for Hearing and Answer dated June 30, 1986, which on page one set forth GDC's address as "479 North Cline Avenue, Gary, Indiana 46406." GDC has never changed this address.

15. In the August 16 Order, the EAB erroneously states that Warren Krebs was required to notify the Regional Hearing Clerk, the Presiding Officer, or the other parties to the case of his change of address when he left Parr-Richey.

16. 40 C.F.R. § 22.05(c)(4) states, in pertinent part, as follows:

The initial document filed by any *person* shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Regional Hearing Clerk, Presiding Officer, and all parties to the proceeding. A *party* who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules. (Emphasis added.)

17. "Person" is defined in § 22.03 as:

[A]ny individual, partnership, association, corporation, and any trustee, assignee, receiver, or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency, or

instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

18. Counsel is not a "person" as defined, nor is he a "party." Thus, the requirements of § 22.05(c)(4) do not apply to counsel, and GDC's counsel was under no obligation to provide notice of a change of address.

19. GDC's counsel was always identified as "Parr, Richey, Obremskey and Morton, Attorneys for Gary Development Company, Inc.," rather than Warren Krebs individually. The Regional Hearing Clerk made no service of the Initial Decision to Parr-Richey.

20. As indicated in the Amendment to Verified Motion to Reconsider Final Order, Warren Krebs was ill and undergoing medical treatment when he first obtained the Initial Decision. Physician's care and laboratory tests were performed in early May 1996. By May 14, 1996, surgery was determined to be necessary. On May 17, 1996, diagnostic and surgical procedures were performed. During the time frame asserted by the EAB to be applicable for the filing of an appeal, Warren Krebs was ill and undergoing intensive medical care.

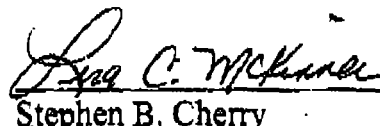
21. The medical condition of Warren Krebs should be given special consideration when reviewing the short time frames.

22. The EAB erroneously concluded that any review would further delay the implementation of an injunctive remedy designed to insure protection of public health and the environment based upon its adoption of Region V's undocumented and unverified

assertion on July 30, 1996, that "a plume of contamination could be migrating undetected to groundwater or the Calumet River."

23. The only evidence in the administrative record is that the groundwater flow is *from* adjacent property *into* GDC's property not *from* GDC's property. Thus, contrary to Region V's assertions, there is no public health or environmental emergency, a fact borne out by the five (5) years spent by the Presiding Officer in rendering the Initial Decision.

WHEREFORE, Respondent, Gary Development Company, Inc., respectfully submits this Second Amendment to Verified Motion to Reconsider Final Order and requests that the Environmental Appeals Board reconsider its August 16, 1996 Order Dismissing Appeal consistent with the requirements of 40 C.F.R., Part 22 and Part 601, et seq., 42 U.S.C. § 6901, et seq., the substantive issues raised by Respondent's June 21, 1996 Notice of Appeal, and any other relief just and proper.



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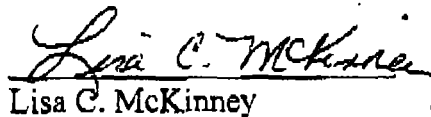
Development Company

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Second Amendment to Verified Motion to Reconsider Final Order has been served upon the following via United Parcel Service Next Day Air Delivery, this 18 day of September, 1996:

Marc Radell  
Office of Regional Counsel  
United States Environmental Protection  
Agency, Region V  
77 West Jackson Boulevard  
Chicago, Illinois 60604

Office of Administrator  
United States Environmental Protection  
Agency  
401 M Street, S.W.  
Washington, D.C. 20460

  
Lisa C. McKinney

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